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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 37

TEXTILE WORKERS UNION OF AMERICA, *Petitioner*

v.

DARLINGTON MANUFACTURING COMPANY, ET AL.

No. 41

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

DARLINGTON MANUFACTURING COMPANY, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

INTRODUCTION

The Chamber of Commerce submits this brief as *amicus curiae* because of the concern of its membership in this matter. Permission to file a brief was granted pursuant to consent of the parties under Rule 42(2).

The Chamber of Commerce of the United States is a federation, consisting of a membership of over 3,900 national, local and state chambers of commerce and trade associations, with an underlying membership of approximately 1,700,000 business firms and a direct membership in excess of 19,400 business firms. Many members are engaged in interstate commerce or in activities which affect interstate commerce and, being subject to the National Labor Relations Act will be vitally affected by the outcome of this litigation. From the standpoint of American managers and investors this is a "watershed case." If the novel doctrines of the National Labor Relations Board now being pressed upon this Court are upheld, they will inevitably direct currents destined to undermine the efforts of the managers of American industry to meet their challenges.

SUMMARY OF THE CASE

This case arose out of a decision of the National Labor Relations Board holding that Darlington Manufacturing Company had violated Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the National Labor Relations Act. In its Order the Board directed that employees whose employment had been terminated by reason of the closing of the Darlington Manufacturing Company be given back pay from the date of such closing until they obtained substantially equivalent employment elsewhere. In its remedy the Board also held that Deering Milliken, the selling agent of the company, and a group of other textile mills loosely described by the Board as "affiliated corporations" or the Deering Milliken "complex" constituted, with Darlington, a "single employer". Accordingly, its Order, supplemented by a provision for employment or preferential listing for employment of Darlington personnel in

these other mills, also runs against this asserted "employer."

The controversy which ultimately reached the Board stemmed from the action of Darlington, a South Carolina Corporation, in liquidating its only plant, a factory manufacturing certain grades of printed cloth, in the fall of 1956. In the spring of that year the Textile Workers Union began an organizing drive among the production and maintenance workers of Darlington, culminating in a Board election on September 6, 1956, in which 256 voted for the Union and 248 against it (R. 52, id., at 270).

In its campaign the Union promised higher wages and opposed what it termed the "stretch out". On September 12, Roger Milliken, president of Darlington, convened a meeting of the Board of Directors and recommended that the board present a resolution to the stockholders that the plant be liquidated (R. 5, 52). Shortly before the election the chief executive officer had reported an operating loss of $40,000. This happened on the eve of the severe textile recession of 1956-8. On October 17, the stockholders voted to shut down operations and liquidate the plant, which was thereupon advertised for sale at public auction. No new orders were accepted and as the work ran out in the different departments the employees who manned those departments were dismissed. All operations were terminated on November 24. At the subsequent auction sale in December the plant and equipment were sold to various bidders.[1] The trial examiner found that there

[1] Textile Workers Union, petitioner in No. 37, asserts erroneously that the plant (Br., p. 6) was "auctioned off piecemeal despite the upon earlier plea that an effort be made to secure a purchaser for the entire, equipped plant". This statement is in direct conflict with the finding that the auctioneer acting for the company first asked for bids on the entire plant and its equipment (R. 53).

was no claim that the sale was not to *bona fide* purchasers for value.

After taking of testimony on the complaint and consideration of evidence bearing on the motivation of the company, the trial examiner concluded (R. 65, *id.*, p. 275) that, while there were several economic factors that might have entered into the decision to close,[2] the fact that Milliken testified that the results of the election and the promises and statements of the Union during the pre-election campaign were matters that entered into his recommendation, was sufficient for the examiner to believe that the mill would not have been closed "at that time" but for the Union's election victory (R. 65, *id.*, p. 275).

In its decision, issued five and a half years after the trial examiner's initial report was published, the Board affirmed his finding that Darlington would not have been closed at the time except for the Union's victory in the election, and his legal conclusion that the incidental termination of the employment of the working force constituted a Section 8(a)(3) violation as a discrimination against union membership. Like the trial examiner, the Board did not deny that other economic factors might have entered into the consideration to liquidate, but added (R. 9):

> Moreover, even assuming, as the Respondent contends, that the six genuine economic factors as well as the employees' union activities were responsible for the closing of the mill, Darlington's ac-

[2] The trial examiner said (R. 65):

> The [economic] factors cited were sufficient to support a decision to terminate operations; certainly it cannot be said that such a decision could not reasonably, or even unreasonably but credibly, be based on those factors.

tion was no less unlawful. A plant shutdown resulting in the discharge of employees that is partly due to employees' union activities constitutes an unfair labor practice.

The remedy formulated by the Board was one of almost unprecedented severity. It not only overruled the trial examiner's findings concerning the lack of responsibility on the part of Deering Milliken—despite two supplemental hearings on this point pursuant to Board remands—but also overturned his recommendation against back pay and directed reinstatement of the employees at the plants of other corporations.

The Court of Appeals for the Fourth Circuit denied enforcement, holding that if a business is terminated completely "the power to close, even if spurred by unionization, is not precluded by the Act" and assuming, *arguendo*, that "Darlington was a division of Milliken", the court went on to hold "that a part, like the whole of a business, may be abolished when the extinction is consummated in circumstances like the present".

STATEMENT OF POSITION

As the great majority of the members of the Chamber of Commerce are business firms or trade associations composed of companies engaged in activities which affect interstate commerce, the Chamber is deeply concerned with the disposition of two issues which this Court has been called upon to decide:

The first and most important question is whether an employer who discontinues operations and goes completely out of business violates Section 8(a)(3) of the Act by terminating the employment of his working force if the discontinuance of business is motivated in

part by reluctance to recognize and bargain with a union which has recently won an election.

The second is whether the Board may issue a remedial order imposing upon other corporations, with public stockholders, liability for the unfair labor practices of a defendant corporation with different shareholders and different employees.

Until this case was decided it had always been taken for granted that there was nothing in the National Labor Relations Act that compelled an employer to remain in business if, confronted with the obligations imposed upon him by the Act as a condition for remaining in a business, he concluded such conditions were too onerous, and simply shut up shop.

The first question is the one actually posed by the Board decision. The issue therefore is considerably broader and more ominous in its overtones to the business community than is indicated by the briefs of the Board and the unions.[3]

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[3] Despite the admonition of this Court, *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80 at 94, 95, that the test before a reviewing court of the validity of an order of an administrative agency depends upon whether its findings are supported by the record, petitioners in both cases here defend the Board order on grounds respecting which the Board made no finding. The unions describe the challenged shutdown as if solely undertaken "to discourage union activities and to avoid having to bargain with a union" (Pet. Br. in No. 37, p. 14; AFL-CIO *amicus* Br., p. 2), and the Government speaks (Pet. Br. in No. 41) of the closing as "a dramatic warning to the employees at other mills of the disastrous consequences of unionization" (*id.*, pp. 29-31). But the Board made no finding with respect to certain testimony cited in petitioners' briefs for the purpose of showing that the decision to close was vindictive and intended to be an object lesson to employees in the other "Milliken Mills". Hence, the argument made in behalf of the Board in No. 41 is based upon a wholly hypothetical situation, *viz.*, that the Darlington plant was closed and the em-

In its opinion, the Board conceded that economic factors entered into the consideration of management to close the plant, buf held that this was not a valid defense in view of the admission that the results of the union election were a factor in the decision to terminate operations (R. 9, 10). That this was in fact the main ground of its holding is demonstrated by the Board's own official explanation, *viz.*, that its 8(a)(3) finding was predicated upon the shutdown being "motivated *in part* by objection to the employees' union activities"[4] (Emphasis supplied). Thus the decision of the Board, set aside by the court below, stands for the broad proposition that an employer in a marginal plant or a plant which is incurring heavy losses may be subjected to the severest kind of liability for back pay if its ultimate decision to withdraw the plant from business is actuated *even in part* by well grounded apprehension of increased costs or less efficient production as a result of union organization of the employees.

If this decision is permitted to stand, it would have dire effect upon employers who do business as individ-

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ployees thrown out of work as a deliberate method of discouraging union membership or activity by the employees in the other Milliken mills. Certainly this was not what the Board found. It did not advert to any possible impact of the Darlington events upon any other plants in its discussion of the asserted violations of Section 8a(1), (3) and (5), and developed the "single employer" theory only in its formulation of "The Remedy". Moreover, the employees to whom relief was extended because they were the supposed victims of "restraint," "coercion," or "discouragement" of union membership consisted only of Darlington personnel.

Accordingly, the observations contained in this brief of the Chamber of Commerce deal only with issues raised by the actual Board findings.

[4] *Twenty-eighth Annual Report of the National Labor Relations Board*, p. 76.

uals, partner or in a corporate form.[5] It would mean that no prudent management could go out of business, no matter how bleak the prospects of the company, if a particular labor situation (*e.g.*, a bargaining agent with a reputation for adamant and exorbitant demands, a threatened strike, an excessive resort to grievances) casts additional shadow—in its mind at least—upon the future of the enterprise, without subjecting the owners to back pay liability of astronomical magnitude.

The Board in rendering this decision is plainly breaking new ground. It admitted in its opinion that "there is no decided case directly dispositive of Darlington's claim that it had an absolute right to close its mill, irrespective of motive" (R. 15). In this respect the decision marks the second departure from precedent[6] on the part of the Board considered in this term of Court in the direction of encroachment upon rights of management hitherto regarded as unaffected by the Act. The concern of the Chamber, which filed an *amicus* brief in the first case, is equally grave with respect to the basic question presented by this one.

It is recognized of course that departures from administrative precedent on matters not previously set-

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[5] The breadth of the Board doctrine has caused misgiving even to the AFL-CIO, which concedes that it would be a violation of the Thirteenth Amendment to force a working proprietor to continue to run his plant (Br. p. 18).

[6] The reference is to *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, No. 14 (argued October 19, 1964) where the Board held that even in the absence of a contract or bargaining request, an employer is under a duty to bargain about contracting out work or discontinuing an operation. In its *Annual Report for* 1963, the Board stated:

> ". . . the Fibreboard case was the first finding of a violation of the Act where the change was not motivated by antiunion considerations . . .".

tled by Supreme Court authority do not necessarily mean that an administrative agency has misconstrued a statute. In this instance, however, the legislative history and background of the statute reinforces the conclusion of the majority of the court below that an employer has a right to go out of business for any reason. Moreover, we shall show that the new doctrine developed by the Board cannot be reconciled with decisions of the various circuit courts of appeal and that in reaching the result, the Board ignored distinctions which the Board itself had adverted to for many years in passing upon such questions as lockouts, runaway shops and plant relocations intended to frustrate union organization.

The second aspect of this case vitally affects the rights of stockholders and investors. This is the holding of the Board imposing liability for the unfair labor practices of the respondent corporation upon other corporations which were not holding companies in any sense of the term, and in which large segments of the stock were held by persons who had no relationship whatsoever to the principal respondent. The Board's conclusion that these corporations together with Darlington constituted one "single employer" goes far beyond the criteria enunciated for extra-corporate liability by this Court in *N.L.R.B.* v. *Deena Artware, Inc.*, 361 U.S. 398. But if the Board's holding here should be sustained it means that some power not spelled out in the Labor Relations Act allows the Board to disregard the recognized limits of corporate liability, thus placing in unwitting jeopardy the investments of stockholders in unaffiliated companies.

ARGUMENT

A. THE ACT DOES NOT COMPEL ANY EMPLOYER TO CONTINUE IN BUSINESS AGAINST HIS WILL

1. The Board Doctrine would deny management any realistic appraisal of all relevant economic factors

According to the Board's own official explanation,[1] a complete shutdown of a business "motivated *in part*" by the fact that the employees had selected a union to represent them is a violation of the Act. This means that even though a plant is involved in economic difficulties, sufficient in themselves to justify a decision to discontinue operations, the management of such a plant acts unlawfully if it views the advent of a union as accentuating these difficulties or regards the result of a union election as "the straw that broke the camel's back." Such an extreme view would force corporate fiduciaries to inflict additional financial losses upon their stockholders in situations in which their own business judgment tells them that the liquidation of a business should be immediately undertaken.

Wholly aside from the issue of whether there is an "absolute" right to discontinue a business, we submit that this holding is not in accordance with the law and has been repeatedly rejected by federal appellate courts.

Although the Board disclaims any power to hold that economic factors may not legitimately be considered by management when it decides to close a mill (thereby discontinuing the employment of a unionized work force), the Board's reasoning in this case rests on the premise that union activity can never be one

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[1] *Twenty-eighth Annual Report of the National Labor Relations Board*, p. 76, *supra*.

of those "economic factors". It is difficult to conceive of any rule of decision which encroaches more drastically upon the right of management to exercise ordinary business judgment in the course of its affairs.

In this particular case, the Board's approach—spelled out in the trial examiner's report—is that even though an employer is losing money and can ill afford higher payroll costs, the selection by the employees of a union which had campaigned on promises of higher wages and less arduous work assignments, does not justify such employer assuming the likelihood of higher costs. According to the Board, since the only legal effect of the election results was the imposition of a duty to bargain, the advent of an aggressive union does not mean that payroll costs would increase, for the law does not compel an employer to yield to union demands.

As we do not attribute even to the Board the theory that the negotiation of a union contract can ordinarily be accomplished by an employer without some concession on wages, manning, or fringe benefits—all items of cost—it appears that what the Board is really saying is that the certification of a labor union does not "inevitably" bring about higher costs. But certainly "inevitability" is a strange test to apply to the question of whether an employer acts in good faith. Day to day decisions of management on virtually every subject, *e.g.*, price changes, new markets, selection of advertising media, stockpiling, build up or reduction of inventory—are based on forecasts more speculative and on information less reliable than a judgment based on a publicized union program and the attitude of employees with respect to it. The view that management should refrain from action with respect to the

future only if the coming event is a foregone conclusion is a novel one.

In situations where a union has won an election in a plant already immersed in economic difficulties, it is difficult to understand why the Board should view as false or ill grounded, management fears that negotiations with that union would result in higher costs or an expensive strike.

Obviously a union which has won an election on promises of higher wages and less stringent work requirements has to make some substantial showing in negotiations in order to command the continued allegiance of the majority who voted for it. The task of persuading a union to temper its demands is one that challenges the skill and knowledge of an experienced industrial relations director. He must patiently discuss every union demand in detail. If he is rejecting union proposals on the ground of comparative wage and working standards in similar enterprises, he must be prepared to document his arguments with facts—not easily obtained except through time consuming surveys of conditions in other industries. If this position is based upon inability to pay, he must also buttress this by a disclosure and analysis of company records. If the union creates employee discontent by giving a false account of the company's position on given issues, he must inaugurate a program of communications to the workers, but so directed that it cannot be construed as "going over the heads of the union negotiators". Above all, he must avoid such legal pitfalls as placing nonbargainable issues on the table, refusing disclosure on certain topics, postponing negotiations, and the like. In other words, the successful

conduct of negotiations by management is in itself an expensive item.

Many companies, however, are too small to afford a full time industrial relations director. This is particularly true of manufacturing industries where small companies predominate and in which the average establishment employs less than a hundred production and maintenance workers. There are literally thousands of such companies.

These are the typical ones, not only in such industries as printing and apparel, but in many of the new industries. For example, in the manufacture of metal business furniture and storage equipment, 123 of the 213 establishments—slightly more than one-half—employ fewer than 50 workers.[8] In the electronic component industry, 264 of 457 plants employ less than 100, and the average worker complement in these plants is 35.[9] In the scientific instrument industry the situation is much the same, 460 of the 539 plants have fewer than 250 in their employ, and in this group the average establishment has less than 40.[10] Companies of this size could obviously not afford the regular services of industrial relations experts and the cost to such enterprises of dealing with unions must therefore be deemed an important economic factor. Certainly it would wipe out the resources of marginal units in the foregoing categories to require them to stay in business until the overly rigid terms of a union contract or an actual strike made them hopelessly non-competitive.

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[8] Source: Bureau of Labor Statistics, U.S. Dept. of Labor, Oct., 1959.

[9] Source: *Id.*, Oct., 1959.

[10] Source: *Id.*, Dec., 1955.

Moreover, if a company fails to meet demands which increase costs, a union is free to strike at any time. If it strikes without warning with a heavy influx of orders on hand, a company would then be faced with contingent liability to its customers for failing to meet deadlines. Yet the strike would still have the full protection of the Act.

If the Board is correct in its thesis that union activities can never be taken into account in a decision to close a plant, then even a stoppage of work does not justify an employer in deciding to dissolve an enterprise. He would still be under a duty to bargain to an impasse with the striking union, *N.L.R.B.* v. *Reed & Prince,* 118 F.2d 874 (C.A. 1, 1941), *cert. denied,* 313 U.S. 595 (1941); he cannot make unilateral changes in wages in order to obtain replacements, *N.L.R.B.* v. *St. Clair Lime Co.,* 315 F.2d 224 (C.A. 10, 1963); and if the union elects to engage in a slow down or a ban on overtime instead of striking, the harassed employer is not entitled under the law to any relief from the Labor Board, *N.L.R.B.* v. *Insurance Agents' Union,* 361 U.S. 477 (1960).

Granted, that such pitfalls and risks confront, to some degree, every employer who has to engage in collective bargaining. It is one thing, however, to say that these are necessary incidents to compliance with law for every employer who proposes to operate a plant in a business affecting commerce; it is quite another thing to say that an employer with a plant already engulfed in difficulty is powerless to avoid such peril and additional expense by shutting down the business entirely. As the Court of Appeals for the Sixth Circuit observed, management may take action "based on reasonably anticipated increased costs in-

stead of waiting until such costs actually materialize." [11]

2. Nothing in the legislative history or language of the Act supports the Board's approach

The notion that the Act prevents an employer unwilling to deal with a union from going out of business would have startled the members of the 74th Congress who, in 1935, enacted the Wagner bill containing in Section 8(3) the very language the Board now relies upon as requiring such a result. Neither of the committee reports in Senate or House even hints at such an intent.

Indeed, one of the principal fears expressed by opponents of the pending legislation at the Senate hearings was that the enactment of the Wagner bill might curtail employment by causing business firms unwilling or unable to assume the additional risk of collective bargaining to close their doors.[12] None of the Senators on the committee warned these witnesses that the pending bill would render such closing illegal, for apparently such a thought never occurred to them. In reporting the bill from the Senate Labor Committee, Senator Walsh, the chairman said:

> Mr. President, there are some fundamental rights an employer has, just as there are rights an employee has. *No one can compel an employer to keep his factory open.* No one can compel an employer to pay any particular wage. No one can compel an employer to hire others in addition to those he sees fit to hire. So with an employee; no one can compel him to work, no one can compel

[11] *N.L.R.B.* v. *Lassing*, 284 F.2d 781, at 783.

[12] *National Labor Relations Act*, Sen. Hearings, pp. 414-15.

> him to go on strike, no one can compel him to leave his work. 79th Cong. Rec. 7673, 74th Cong., 1st Sess. (1935). (Emphasis supplied.)[15]

Two years later, in one of the leading cases upholding the constitutionality of the Act, this Court recognized that the right of an employer to avoid the impact of the new statute by ceasing to be an employer was implicit. Thus, in *Associated Press* v. *N.L.R.B.*, 301 U.S. 103, a discriminatory discharge case, the Court answered the contention that under the Constitution an employer could not be compelled to retain a particular person in his employment, by stating—

> The Act does not compel the petitioner to employ any one. . . . *Id.*, 301 U.S. at 132.

It is also significant that during the first five years of the history of the Board—the so-called Madden period of 1935-1940—the agency itself never took the position that a firm could not go out of business because a union had appeared on the scene. In the late 30's, when the economy was depressed, the permanent closing of many marginal mills after successful union organizing drives was a commonplace. Yet, during this period official volumes of reported decisions of the Board, which agency at that time had authority to issue its own complaints, do not contain a single case indicating that the Board deemed a permanent closing to be an unfair labor practice. The Board did, however, develop the principle that an employer could not

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[15] Senator Walsh's explanation of the bill was given great weight by this Court in two cases that reached it many years after the statute was enacted. *N.L.R.B.* v. *Truck Drivers Local Union*, 353 U.S. 87 (right to lock out), and *Wisconsin Employment Relations Bd.* v. *Algoma Plywood & Veneer Co*, 336 U.S. 301 (authority of states to prohibit compulsory membership agreements).

evade his obligations under the Act by moving a plant which had been unionized, or threatened with unionization, to another labor market area. *Jacob & Ruth Klotz,* 13 NLRB 746; *Isaac Scheiber, et al,* 26 NLRB 937. Similarly the Board held that a lock-out undertaken to frustrate union organization was a discriminatory act against the employees, *Kuehne Mfg. Co.,* 7 NLRB 304; *Republic Steel Corp.,* 9 NLRB 219; and that the substitution of another type of messenger service for one that had been unionized was illegal, *Bank of America,* 26 NLRB 198.

It was not until 1941 that any cases may be found in which the Board held that even a discontinuance of one operation amounted to a violation of Section 8(a)(3). This first case was *Williams Motor Co.,* 31 NLRB 715, where a company engaged in repairing and servicing automobiles and rehabilitating second-hand cars had not gone out of business, but had simply closed its body and fender shop and subcontracted out the work generally performed in it. According to the Board, the company discovered that the men in the body and fender department were union adherents, closed the department solely for that reason, but had the same work done on its own account in another shop. This case was followed the same year, 1941, by *Newton Chevrolet,* 37 NLRB 334, a situation very similar on the facts, with the Board taking pains to emphasize that the paint shop, which had been discontinued in order to get rid of union employees, was still fully equipped, and that the respondent undertook, through another source, whatever repainting needed to be done on cars serviced for customers.

In none of the early cases, however, did the Board ever hold that an employer who decided to discontinue

permanently his entire business violated Section 8(a)(3) when he let his work force go, whatever his motivation might have been. Had there been such extreme holdings, Congress in all probability would have clarified the Act in this respect during the Taft-Hartley revision of 1947. But up to this time Section 8(a)(3) had been applied only to such subterfuges as transplanting operations, contracting out, and temporary shutdowns (lockouts)—and then only where the motive of stopping unionization was reasonably obvious.

The contention in the Board's opinion, in view of this background, that Darlington's dissolution was "literally proscribed" by Section 8(a)(3) of the Act (R. 16) is difficult to understand. The key word in Section 8(a)(3) is "discrimination", a word that suggests disparate treatment of one employee or a group of employees as against another. Granted, there are cases holding that this subsection is applicable to situations where an entire group is discharged or suspended from employment without distinction as between union and non-union men, but these all deal with situations where the employer, if the discharge was permanent, expected to recruit replacements either at the same location or at another. The Board relies on *Waterman Steamship Corporation*, 309 U.S. 206, where the offending employer had discharged the entire crew of a ship that had been at least partially unionized. There was nothing in the record, however, to indicate that the employer was going out of the steamship business entirely or even intended to scrap the particular ship.

In an attempt at *reductio ad absurdum* the Board, in its opinion,[14] states that "an employer with a staff

[14] The same argument appears in the brief *amicus*, AFL-CIO, p. 11.

of 100 employees violates Section 8(a)(3) if he discriminatorily fires 50 or 75 or even 99 of his 100 workers, or if he temporarily lays off all of them, but if he retaliates against them for their union activities by permanently discharging all of them, the finality of his conduct would make it lawful. The argument is self-defeating."

The short answer to this, of course, is that the discrimination lies in the fact that the hypothetical discharges of part of the work force or the lockout was intended to enable the employer to obtain substitutes or a chastened work force not inclined to unionization when operations were resumed. Surely there is a vast difference between this situation and a permanent discontinuance of operations.

The Board's reference to "firing" or "discharging" in the Darlington context is really an exercise in semantics which puts the cart before the horse. It is true that an employee whose job is permanently terminated because his company has closed down is in a plight similar to that of a dischargee, since neither has any prospect of regaining his old job with that particular employer. But in the former case it is the permanent closing of the plant which brings about the severance of employment. In other words, the so-called "discharge" by an employer closing his plant is not a measure undertaken to create a vacancy for another employee.

The Board's reliance on the preamble of the Act (R. 17-18) is equally misplaced. One of the preceding paragraphs makes it clear that the "obstructions to the free flow of commerce" to which Congress was alluding was "injury, impairment, or interruption of commerce" resulting from "certain recognized sources

of industrial strife and unrest". To be sure, the permanent closing of an industrial establishment means that its goods no longer enter into the flow of commerce, but it is certainly a strained construction of the preamble to equate a withdrawal from business, irrespective of motivation with a strike or lockout which interferes with the interstate activities of a business which is still a going concern.

3. The decision of the court below is supported by the weight of judicial authority

The proposition that an employer has no right to close his doors permanently if actuated by anti-union animus was rejected by the court below, which noted that other courts of appeal had long given explicit sanction to the right of discontinuance. There is nothing novel about this holding. As the court said, its reasoning is in accord with a number of cited decisions from other circuits, including the First, Fifth, Sixth, Seventh and Eighth.[15]

In one of these cases, *N.L.R.B.* v. *New Madrid Mfg. Co.*, 215 F.2d 908, 914, the Court of Appeals for the Eighth Circuit made abundantly clear the fundamental character of the right of an employer to go out of business permanently (R. 13, 14).

In its opinion, the Board attempted to distinguish *New Madrid* by referring to the court's observations

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[15] The Court cited *N.L.R.B.* v. *New England Web, Inc.*, 309 F.2d 696, 700 (C.A. 1, 1962); *N.L.R.B.* v. *Tupelo Garment Company*, 122 F.2d 603, 606 (C.A. 5, 1941); *N.L.R.B.* v. *Caroline Mills, Inc.*, 167 F.2d 212, 214 (C.A 5, 1948); *N.L.R.B.* v. *R. C. Mahon Co.*, 269 F.2d 44, 47 (C.A. 6, 1959); *Atlas Underwear Co.* v. *N.L.R.B.*, 116 F.2d 1020, 1023 (C.A. 6, 1941); *Jays Foods, Inc.* v. *N.L.R.B.*, 292 F.2d 317, 320 (C.A. 7, 1961); *N.L.R.B.* v. *New Madrid Mfg. Co.*, 215 F.2d 908, 914 (C.A. 8, 1954).

as merely *"obiter dictum"* (R. 14) pointing out that the Jones Manufacturing Company, a successor company, owned entirely by the manager of the New Madrid plant who had participated in the unfair labor practices and who after buying the New Madrid machinery started up the same business in another location, was ordered to reinstate the locked out employees. The Board failed to mention that Jones did not contest this part of the Order, but the Court suggested that Jones might have been able to obtain some modification had he sought relief; 215 F.2d 908, at 915. In any event, it is plain that this case falls into the lockout or runaway category and the Board's attempt to say that its holding in *Darlington* is in accord with the modified decree in *New Madrid* would be true only if a successor corporation to Darlington had resumed the same business, but refused to rehire the Darlington personnel.

Indeed, if there is something in the National Labor Relations Act which makes it unlawful for an employer to go out of business rather than to comply, the statute is unique in the field of regulatory legislation. Nothing in the Social Security Act nor in the Fair Labor Standards Act, for example, prevents employers from shutting down, even though the effect of such action is to deprive their employees of further retirement credits or the attainment of a fair minimum wage.

Nevertheless it is argued (AFL-CIO br., pp. 18-20) that legal doctrines developed in other branches of the law show that the court below was in error in declaring that an employer has an "absolute prerogative" to go out of business. The analogies drawn by amicus, however, to refute the validity of this statement have

virtually no bearing on the basic point made by the court.

The argument is made, for example, that (*id.*, p. 18) ". . . when an employer engages in a shutdown in violation of the Act, he can properly be made to resume operation, just as employees who engage in a forbidden strike can be ordered to resume work". This is perhaps true when an employer engages in an illegal lockout or an improper plant relocation, because he is doing this to influence future action by his employees with respect to union conduct. But while employees may be forbidden to strike for certain objectives, *e.g.*, to compel their employer to handle only products with a union label, there is nothing in the Act which forbids an employee to quit his job permanently. Thus an employee who personally resents having to process or transport material coming from an anti-union concern is free to abandon his employment. Logic suggests that an employer, corporate or individual, who would rather quit business entirely than deal with a labor organization has the same right.

The union brief (pp. 18, 19) concedes that the Thirteenth Amendment might bar an order preventing an individual manager or an induividual owner-operator from quitting, but observes that the constitutional protection against involuntary servitude applies only to individuals. It ignores the impact of the Fifth Amendment upon an administrative order compelling a corporation to remain in existence for the purpose of enabling its employees to engage in union activity. From the standpoint of the stockholders, such a device might well involve the taking of property without due process.

The contention that antitrust decisions (*id.*, p. 19) show that one company cannot agree with a competitor to shut down its business if the purpose of such agreement is to restrict competition in the industry, is obviously pointless. It ignores the distinction which the conspiracy cases made between concerted and individual action. Certainly nothing in the antitrust laws forbids the stockholders of Chrysler or Ford from liquidating their companies as long as such action is not the result of collusion or understanding with a competitor, even though the practical effect of such liquidation would give General Motors a virtual monopoly of automobile manufacture.

Another far-fetched analogy (*id.*, p. 20) is to *Griffin* v. *Prince Edward County*, 377 U.S. 218, holding that a state could not permit a county to abandon a public school system purely on racial grounds. This is scarcely in point, for the difference between the public obligations of a Governmental body and the obligations which can be legally imposed on private enterprises is manifest.

If analogies to the civil rights field shed any light upon the question, a much closer parallel may be found in the Public Accommodations provisions of the Civil Rights Law of 1964 (Title II, Public Law 352, 88th Cong.). Section 201(a) of this Act in language very similar to Section 7 of the National Labor Relations Act confers a "right" to enjoy services in hotels, restaurants, and places of entertainment "without discrimination . . . on the ground of race, color . . .". Section 203, like Section 8 of the Labor Relations Act, then implements this right by prohibiting any persons from withholding or denying such rights. What is the legal situation when a restaurant owner who, for rea-

sons of economic policy or even prejudice, is averse to serving Negro guests, closes his establishment permanently when he learns that a group of Negroes is about to arrive?

If the reasoning of petitioners and the amicus in No. 37 is applied to the Civil Rights Act, it inevitably follows that such a restaurant owner has violated Section 203. This is not the position that the Government is taking with respect to that statute, however, for in his argument this term in *Atlanta Motel, Inc.* v. *U.S.*, No. 515, and *Katzenbach* v. *McClung*, No. 543, the Solicitor General, in response to a question, informed the Court that a restaurant could lawfully avoid the statute by purchasing only local goods, 33 LW 3313. *A fortiori*, a restaurant which abandoned operations entirely would be in the clear. One looks in vain for any difference in language or Congressional intent to see why the opposite answer should be given with respect to the Labor Relations Act.

4. The Board's rationale is in conflict with the authorities

In holding that an employer violates the Act when he decides to close a plant which is running into economic difficulties, if he is motivated even in part by the arrival of a union upon the scene, the Board is advancing a proposition that has been repeatedly repudiated by the courts of appeal in numerous circuits.

In *New England Web, supra*, 309 F.2d 696, the Court of Appeals for the First Circuit had occasion to consider the shut down of a small New England plant which had run into difficulties with its customers because the weavers, being paid on a piece work basis, were more interested in speed than quality of production. In order to improve the quality of its products

the company decided to pay the weavers on an hourly basis. The weavers in turn sought representation by a labor union which won an election. At the first bargaining session the company informed the union that it was going to liquidate the plant, that it would accept no more orders and would utilize the weavers only to run out the beams already in the machines. The Board held that the closing of the plant was a violation of Section 8(a)(3). The court set aside this order. According to the Court, *id.*, at 700:

> We start with the proposition that a businessman still retains the untrammeled prerogative to close his enterprise when in the exercise of a legitimate and justified business judgment he concludes that such a step is either economically desirable or economically necessary. This prerogative exists quite apart from whether or not there is a union on the scene.

The Court pointed out that the company's economic problems had caused the officers to take some decisive measures to avert the rapidly deteriorating position of the company and that the decision to change the method of wage payments indicated this. The Court went on to say, *id.*, at 701:

> . . . The decision to change the mode of compensation was significant evidence of this. When this decision—far from immediately ameliorating the company's economic position—caused a walkout and a strike by the weavers and their subsequent unionization, then this was assuredly a new factor to be considered by the New England Web management in determining a future course of action. Viewed in the context of the shaky financial status with which New England Web was confronted, a decision—at that point—to go on no more cannot be said to be inherently implausible. . . .

> Certainly the company could reasonably expect the advent of the Union to affect its already precarious cost picture. The record indicates that the first act of the Union representative following the Union election on April 1 was to broach the subject of wages to Jarvis. Moreover, at the first bargaining session following the unionization—April 5—a union representative indicated to Jarvis that the workers would not return to New England Web for the wages which it had been previously offering.

The same position has been repeatedly taken in the Sixth Circuit. See *N.L.R.B.* v. *Adkins Transfer Company,* 226 F.2d 324; *N.L.R.B.* v. *R. C. Mahon Company,* 269 F.2d 44, cited with approval by the court below and *N.L.R.B.* v. *Lassing,* 284 F.2d 781, a 1960 decision. The latter case is particularly significant as it did not involve the complete shut down of the plant but a decision to discontinue one operation. The respondent in that case was a chain of gasoline service stations which had utilized its own trucks to distribute gas to its filling stations. It had been concerned, however, with the mounting costs of trucking equipment and had under consideration the possibility of using a common carrier rather than its own trucks.

Before any steps had been taken to arrange for common carrier service, however, the majority of the drivers joined a teamster union. The company then gave them separation notices telling them that it was going to transport gasoline in the future under a contract with a common carrier and notified the union to the same effect when the company and union representatives met later that morning. In *Lassing,* the Court said, *id.,* at 783:

> The Board contends that this case is not controlled by the ruling in the Adkins and Mahon

> cases because the respondent accelerated its proposed change in operations upon its learning that the three employees had joined the Union and before any demands for increased pay for said employees had been made upon it by the Union, and that such action constituted the discrimination found by the Board to exist.
>
> We do not agree. Although the Union had made no demand for increased pay, the evidence fully justified respondent's belief that such demands would be made and could not be met. Under the circumstances we do not believe it was incumbent upon the respondent to delay the effective date of its new method of operation previously decided upon before the advent of the Union. . . . The advent of the Union was a new economic factor which necessarily had to be evaluated by the respondent as a part of the overall picture pertaining to costs of operation. It is completely unrealistic in the field of business to say that management is acting arbitrarily or unreasonably in changing its method of operations based on reasonably anticipated increased costs, instead of waiting until such costs actually materialize.

The rule enunciated by the Board in the instant case is not only in conflict with these decisions in the First and Sixth Circuits, but cannot be reconciled with a leading case in the Fourth Circuit, the jurisdiction in which this controversy arose. This was the case of *Mount Hope Finishing Co.* v. *N.L.R.B.*, 211 F.2d 365, involving a Massachusetts finishing plant where the volume of business had been diminishing for some years. This plant closed its doors and sold its machinery after a union had won an election. Subsequently one of the principal stockholders, using equipment from the Massachusetts works, opened a new establishment for finishing grieg goods in North Carolina,

adopting the Mount Hope name and trademark. The Board, as in this case, found that the company had violated Section 8(a)(3) and ordered the Massachusetts personnel reinstated with back pay in the new plant.[16] On petition for review the court set aside this order, noting that because of decreasing business in New England, the company had been considering a Southern location even before the union organizing drive. It observed:

> The entrance of the union did not alleviate the trouble, *but served only to accentuate it,* and it was obvious to the company that it could not make a go of the business prior to 1951 when the union was formed, it would be no better able to succeed *after the pressure of the union* was added to the existing difficulties. 211 F.2d 365 at 372 (Emphasis supplied).

In the present case, the trial examiner—whose conclusions in this respect were accepted by the Board—found that certain factors cited by the company, *e.g.,* a projected loss of $40,000 for the remainder of the calendar year, a shrinking market because of Japanese textile imports, the high cost of completing a projected plant reconstruction program, etc. "were sufficient to support a decision to terminate operations" (R. 65). But having found that "but for the union's election victory, the decision (to liquidate) would not then have been made, the examiner then concluded that an unfair labor practice had been committed because "termination due to a mixture of reasons, some lawful and others not, violates the Act" (id.).

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[16] Significantly in this case, no complaint was issued until the existence of the North Carolina plant was discovered a few months after the Massachusetts closing. Accordingly, the Board holding was based on a run away shop theory; not on the ground that the liquidation of the old plant was illegal *per se.*

The Board has tried to distinguish *Mount Hope* and some of the other cited decisions on the ground that in those cases, the courts had found that the discontinuances were motivated by other factors than anti-union reasons. This is a mere play upon words. What the Board characterizes as an unlawful reason in this case was precisely what it was in *New England Web, Lassing,* and *Mount Hope, viz.,* the candid recognition that in an enterprise already beset by economic difficulties—costs exceeding revenues—the problem of reducing costs is predictably aggravated by the arrival of a union on the scene dedicated to a program of higher wages. Those cases hold that this is a legitimate factor for any employer to consider.[17]

5. The basic right to discontinue a business completely is not impaired by the fact that an employer controls other plants or enterprises which may continue to function.

Perhaps because of the unassailable logic of the foregoing judicial decisions, perhaps because of the inherent unreasonableness of the Board's extreme position, the Solicitor General in the brief submitted for

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[17] The only authority cited for the contrary view propounded by the Board and the trial examiner in their respective opinions (R. 9, 55, 65) is *N.L.R.B.* v. *Jamestown Sterling,* 211 F.2d 725-26 (C.A. 2). Examination of that decision shows, however, that the challenged Board order had nothing to do with plant closings or the discontinuance of an operation, but related merely to the discharge of some employees whom the employer contends had been negligent and delinquent in the performance of their jobs prior to any union activity on their part. The Court—correctly in our opinion—sustained a finding of the Board that this prior misconduct was a mere pretext, and hence not a defense to an alleged violation of Section 8(a)(3). Obviously there is a tremendous difference between a case where misconduct which might have justified discharge was condoned until the offenders joined the union, and a case where the probable impact of unionization upon costs was a factor taken into consideration.

petitioner in No. 41 has expressly declined (Br., pp. 41, 42, fn. 40) to defend the holding that an employer who abandons his whole business as "reprisal" for the union activities of his employees violates Section 8(a)(1) and 8(a)(3), notwithstanding that this was the very ground on which the Board rested its decision,[18] and that disagreement with this proposition was the principal basis for its reversal by the court below. Instead, this Court is told that it is unnecessary to pass upon this point since the Darlington mill, even though permanently discontinued, was only a part of the employer's business.

Assuming *arguendo* that the corporate relationships between Darlington and other corporations in the so-called Deering Milliken "complex" were such that Darlington may be deemed a mere division of a larger enterprise and hence the closing of its plant should be treated as if it were just one factory in a single multi-plant manufacturing corporation, it is submitted that the principles previously discussed are equally applicable. In other words, if a wholly independent single plant company can lawfully go out of business under the circumstances of this case, a multi-plant company can also shut down operations at one location as long as it refrains from transferring the business done there to some other plant. The decisions of the courts which have disapproved the Board's condemnation of an employer's discontinuance of an operation if prompted in part by the advent of a union on the scene, have not been confined to circumstances in which an entire business was dissolved.

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[18] The finding that the Milliken "complex," including Darlington, was a single employer, went only to remedy in the Board's opinion.

In *N.L.R.B.* v. *R. C. Mahon Co.*, 269 F.2d 44, 47 (C.A. 6, 1959) the discontinuance encompassed only the plant protection department of a large structural steel fabricator. The court said:

> We find nothing in the National Labor Relations Act which forbids a company, in line with its plans for operation, to eliminate some division of its work. As held in National Labor Relations Board v. Adkins Transfer Company, Inc., supra, [226 F.2d 324] an employer faced with the practical choice, either of paying enhanced wage rates demanded by a union or of discontinuing a department of its business, is entitled to discontinue.

In *Lassing*, 284 F.2d 781, *supra*, the employer did not close down the entire chain of filling stations. He eliminated only his own trucking service. And in *New England Web*, 309 F.2d 696, also discussed, *supra*, the closed plant was only one of a number of textile mills controlled by related corporations which—at least according to the Board's findings—constituted a single employer.

Ordinary principles of logic reinforce these court decisions. Thus if an independent manufacturer of typewriters may lawfully decide to close his plant for the same reasons which motivated Mahon or New England Web, it would be absurd to say that a multi-plant manufacturer of office equipment violates Section 8 (a)(3) if, under identic circumstances, it decided to get out of the typewriter business, and closed down its typewriter division.

B. THE IMPOSITION OF RESPONSIBILITY FOR UNFAIR LABOR PRACTICES OF ONE CORPORATION UPON OTHER CORPORATIONS HAVING WIDELY DIFFERENT SETS OF STOCKHOLDERS VIOLATES FUNDAMENTAL PRINCIPLES OF CORPORATION LAW.

All but lost sight of in the Board's effort to merge Darlington and numerous "related" corporations into a single employer is the fact that it was Darlington, and Darlington alone, which committed the actions found by the Board to have violated the Act. It was not until the Board concerned itself with formulating a remedy that the agency chose to disregard the separate corporation structures of Deering Milliken, Darlington, and the related corporations, and held them all to constitute a single employer for the purposes of back pay and reinstatement. The corporations other than Darlington are accordingly not held accountable as co-perpetrators of any unfair labor practices. Rather, the Board would hold them financially responsible for the practices of Darlington on a theory of vicarious liability, attributable to their role in what the Board termed "the Deering-Milliken complex."

1. The Board's theory flies in the face of the pronouncements of reviewing courts

It is axiomatic in our jurisprudence that separate corporate entities are not to be lightly disregarded, even where—contrary to facts in this case [19]—one corporation holds a majority stock interest in another. "The fact that one corporation owns a majority of

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[19] In the case at bar, Deering Milliken did not hold a majority of stock in Darlington. Inasmuch as it held only 41.4% of Darlington's stock there was no parent-subsidiary relation. The Board, however, inferred majority ownership by adding to the Deering Milliken holdings the stock held by individual members of the Milliken family, consisting of 27 relatives and a decedent's estate.

the stock of another and through its stock control selects from its own directors and officers a majority of all of the directors or officers of the other corporation, without more, does not justify the application of the instrumentality rule", *Taylor* v. *Standard Gas and Electric Co.*, 96 F.2d 693, 705 (C.A. 7, 1938), rev'd on other grounds, 306 U.S. 307. The enormity of the Board's departure from the traditional concepts of corporate liability is measured by its framing of a back pay and reinstatement order encompassing all corporations in which a particular "family," the Millikens, held substantial interests.

The Board's formula for piercing the corporate veil was disarmingly put: "It is now well established that for two or more legal entities to constitute a 'single employer' for purposes of assessing liability for unfair labor practices it must be shown that there was a sufficient degree of common ownership and common control of labor relations and operations so that it may be said that they are engaged in a common enterprise." Even this plausible phrasing, with its emphasis on "sufficient degree" and "common enterprise", serves to misstate and diminish the rigorous tests applied where the corporate entity may be disregarded. Contrast the Board's statement with that of Mr. Justice Cardozo in *Berkey* v. *Third Avenue Railway Co.*, 244 N.Y. 84; 155 N.E. 58 (1926):[20] "Dominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent."

If the courts affirm the Board's theory that the normal business practices of related corporations suffice

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[20] Quoted with approval by this Court in *N.L.R.B.* v. *Deena Artware, Inc.*, 361 U.S. 398, 403 (1960).

to transform them into a common enterprise and thus a single employer, it would have the startling effect of stripping limited liability from a large segment of our domestic corporations. In short, the features upon which the Board relies as constituting sufficient interrelationship to pierce the corporate veil, are the very incidents of business practice which the concepts of separate entity and limited liability were designed to protect.

It is not our intention to argue here the validity of the Board's findings of fact, but rather to concern ourselves with the criteria that the Board invokes to destroy separate corporate status. With respect to common ownership, the Board finds in effect a parent-subsidiary relationship even though the supposed parent does not own a majority of the stock of the subsidiary. It arrives at its conclusion by tacking the number of shares held individually by members of a family, no matter how remote the kinship,[21] to the total held by the alleged parent corporation.[22] The Board

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[21] Implicit in this approach is the notion that the individual necessarily is subservient to his family, and acts in concert with it in respect to all corporate matters. The "family" to which the Board adverts is not, it might be noted, even the immediate family in the commonly accepted sense, but consists of the 27 individual lineal descendants of one Seth Milliken, and one estate operated by a bank. We are aware of no rule of law which assumes the dominance of the family over its adult constituents in the decision-making process. Such a view is far more suited to the patriarchal society of, let us say, pre-Communist China, than to the realities of everyday life in the United States. Compare *Mount Hope Finishing Co.* v. *N.L.R.B.*, 211 F.2d 365 (C.A. 4, 1954), where an adult son, a vice-president and stockholder in a corporation controlled by his father, not only opposed his father's desire to close or relocate the plant, but took the witness stand on behalf of the General Counsel.

[22] 139 NLRB at 256.

asserts the test of "common control" is sufficiently met (1) if Deering Milliken, acting as a selling agent, a typical function in the textile industry, sold the goods and factored the accounts receivable, at a regular commission rate, for Darlington, and handled the latter's tax and insurance matters; (2) if Deering Milliken Service Corporation, whose stock was owned not by Deering Milliken but by Darlington and the other manufacturing companies, purchased equipment and cotton, and provided cost and quality control services, for its corporate stockholders; and (3) if Roger Milliken, the president of all but one of the related corporations, received personnel and financial reports from each corporation in which he held office, and was consulted and gave recommendations on various aspects of those corporations' affairs.

The key connecting link among the corporations, as the Board sees it, was the election of members of the Milliken "family" to executive positions and directorships, and particularly the elevation of Roger Milliken to the presidency, of each of the corporations. The Board's attachment of special weight to common corporate officers ignores the repeated admonitions of courts of appeals that this factor is not sufficient to invoke the instrumentality rule. In *Fisser* v. *International Bank*, 282 F.2d 231 (C.A. 2, 1960), where the court refused to hold a parent bound to submit to an arbitration agreement executed by its subsidiary, the court noted, 282 F.2d at 238, that:

> "It would, of course, be a complete disregard of the basic structure of corporation law to hold Allied, merely because it elected the respondent's officers to be its officers, forfeited its entity and deprived its parent stockholder of immunity from liability for its contracts."

The Seventh Circuit in *Steven* v. *Roscoe Turner Aeronautical Corporation,* 324 F.2d 157, 161 (C.A. 7, 1963), reiterated that rule:

> "While stock control and common directors and officers are generally prerequisites for application of the instrumentality rule, yet, they are not sufficient to bring the rule into operation. . . . Such factors are common business practice and exist in most parent and subsidiary relationships."

Yet, it is from this discredited premise that the Board's imputation of liability apparently follows. For, if no meaningful significance can be attached to Roger Milliken's election to the presidency of Darlington, then his performance of the routine duties of his office, *e.g.,* circulation and receipt of reports and memoranda, consultation, and advice, does not change the legal situation. To hold otherwise would reduce the individual invested with the presidency of a corporation to a mere figurehead, whose interest in his corporation's progress must be satisfied by newspaper accounts of his firm's activities.

The courts have refused to countenance so unrealistic a view of the corporate office or the corporate entity. Indeed, it is clear, in cases where the proposed remedy is so drastic a penalty as disregard of the corporate entity, that they are unwilling to substitute the Board's loose notion of "common enterprise" for the strictly defined standards of instrumentality or "alter ego".

Perhaps the most relevant of the recent cases is *Fisser* v. *International Bank,* 282 F.2d 231 (C.A. 2, 1960), where the question presented was whether a parent, International, was bound to submit to an arbitration agreed to by its alleged instrumentality, Allied, and a coal importer, Fisser. The salient facts were

these. International, through its president, Vreeland, agreed with a firm of maritime brokers, van Ommeran, to finance a business which would involve the chartering of ships. Vreeland told van Ommeran that International would create a company, Allied, to operate ships and transport cargo, and would furnish Allied with all necessary finances and stand behind its performance. Van Ommeran told Fisser that it was acting on behalf of Allied, a company "nominated and controlled" by International, and furnished Fisser a list of International's officers and directors.

Allied was organized by one of International's subsidiaries. International owned 50 percent of its stock and held the remaining 50 percent until the loan which it had agreed to make to Allied was repaid. Vreeland became Allied's president, International's treasurer became its treasurer, and an attorney who represented some of International's subsidiaries was its secretary. These individuals also comprised three of the four directors.

Thereafter, Vreeland gave van Ommeran authority to contract, acknowledged van Ommeran's confirmation of that authority in a letter signed by him on International stationery as its president, and advised van Ommeran that Allied had retained a manager authorized to discuss any business matters. Thereafter the contract with Fisser was approved by Allied's directors and signed by Vreeland as its president, after it had been scrutinized by International's attorneys. Vreeland took steps to obtain a loan but withdrew his request. Allied, which never had capital in excess of $500.00 and never received a loan from International, took no steps toward performance of its contract and accordingly was sued.

The court refused to disregard Allied's separate corporate status. In finding that it was not the alter ego of International, the court listed the three elements which, it said, must be proved if the instrumentality rule is to be invoked, 282 F.2d at 238:

> "(1) Control, not mere majority or complete stock control, but complete domination not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
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> (2) Such control must have been used by the defendant to commit fraud or worse, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and
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> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of."

The court found none of the elements present. Unlike the Board in the case at bar, the court was unwilling to presume that the responsible executives of a subsidiary were acting, with respect to that corporation's affairs, in their capacity as executives of the parent. "It is equally plausible", the court states, "to ascribe the acts to the same individuals as Allied's executives participating in a manner normal and usual for directors of an independent corporation." To hold otherwise would "be a complete disregard of the basic structure of corporation law."

Control, even if it existed, was not used to perpetrate the violation of any legal duty, nor did any breach of duty proximately cause the injury complained of. The latter point is particularly significant to the case

at bar, for there is not a shred of evidence—nor did the Board look for any—to indicate that the members of the Darlington board of directors in recommending dissolution of that corporation were acting pursuant to any interest other than their relationship with Darlington. Indeed, the evidence strongly points to the contrary conclusion, for if the proposed liquidation of Darlington were an item of major importance to the corporations involved in the Deering Milliken "complex", it would be expected that the boards of directors of the other corporations would have been convened to pass upon the Darlington situation. Yet the only board of directors which acted upon the closing was that of Darlington itself.

Steven v. *Roscoe Turner Aeronautical Corporation, supra,* is also very much in point, for there, far more control than that found by the Board to exist in the Darlington situation was present. Yet the court was unwilling to impute liability to a parent corporation. This was a case—a wrongful death action—where plaintiff charged that the liability of TAC in an air crash should be imputed to its parent, RTAC. The evidence revealed that the owners of RTAC owned 70 percent of the stock of TAC; that there was a substantial identity of officers and directors of the two corporations, including one individual, Turner, who was chairman of the Board of RTAC and president of TAC; and that the acts of the manager and vice-president of TAC were subject to the approval of Turner, that the manager had no authority to hire pilots without Turner's approval, and that Turner or another officer of both corporations made one or two trips per week to TAC to help supervise its operations. In affirming the granting of a motion for summary judgment by defendant, the court noted that the supervi-

sion by Turner "showed merely the sound business practice of aiding [the general manager-vice-president] in the performance of his managerial duties for TAC."

If the test of "common enterprise", as the Board sees it, were sufficient to dissolve traditional corporate lines, no two corporations in parent-subsidiary relationships—or even where the same person is the majority stockholder of both—could engage in related businesses with any assurance that they would be insulated from any corporate transgressions of the other. We submit that if a business creditor injured by Darlington's dissolution were to look for relief to the other corporate entities encompassed by the Board order, his attempt to impute liability would meet summary rejection at the hands of any court. If so, there is no justification for the Board to assert new standards of relief merely because it regards the Darlington employees as entitled to the role of creditors.

Liberal as the courts have been in allowing wide latitude to the Board in the fashioning of remedies, they have not been willing to grant the Board license to disregard the elements of basic corporation law in imputing liability to employers other than the primary employer. *Press Company* v. *N.L.R.B.*, 118 F.2d 937 (C.A.D.C., 1940); *N.L.R.B.* v. *Norma Mining Corporation*, 206 F.2d 38 (C.A. 4, 1953); *N.L.R.B.* v. *Aluminum Tubular Corporation*, 299 F.2d 595 (C.A. 2, 1962); *Mt. Hope Finishing Co.* v. *N.L.R.B.*, 211 F.2d 365, 372 (C.A. 4, 1954); *N.L.R.B.* v. *Brown & Root, Inc.*, 203 F.2d 139 (C.A. 8, 1953); *N.L.R.B.* v. *Tupelo Garment Co.*, 122 F.2d 603 (C.A. 5, 1941). See also *Bachman Machine Co.* v. *N.L.R.B.*, 266 F.2d 599 (C.A. 8, 1959); *Roy & Sons* v. *N.L.R.B.*, 251 F.2d 771 (C.A. 1, 1958).

2. The Board's decision disregards the immunities of minority stockholders

It was an assumption vital to the Board's determination that Deering Milliken in effect was the parent of Darlington was that no distinction should or could be drawn between the stock in Darlington held by Deering Milliken Inc. and that held by individual members of the Milliken "family." If such individual stock holdings were not included in the computation, "Deering Milliken" did not hold a majority interest in Darlington. The agency's assumption, of dubious merit generally and wholly unsupportable on the facts of the case at bar, runs roughshod over the traditional rights of minority stockholders.

The plight of the minority stockholder is dramatized by the Board's assessment of liability against a number of corporations, related in the sense that the Milliken family held some stock in each, but each of which is owned in part by non-Milliken interests.[23] A potential prudent purchaser of stock in Deering Milliken, Inc. or in one of the other related manufacturing corporations reasonably well advised of the character of those corporations, would not for a moment suspect that the worth of his investment could be drained by imposition of back pay attributable to Darlington's unfair labor practices. Looking to the holdings of Deering Milliken as a corporation he would find no parent-subsidiary relationship with, or for that matter, any indication of control over Darlington.

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[23] Approximately 45 per cent of the shares of one of the Milliken group, Hartsville Cotton Mill, were owned by outside stockholders. At the other cotton mills, outside stock ownership ranged from 12 per cent to 44 per cent.

It is at best paradoxical to visit a vicarious liability upon arms-length purchasers of stock who are barred at the threshhold from knowing of their peril. Where Corporation A owns a controlling interest in Corporation B, any stockholder in Corporation A is at least aware of the potential danger to which he is exposed, for corporate ownership of a majority interest in another corporation, at least presents the conceivable risk of actual domination and consequent liability.

The Board's approach would appear to subject a stockholder to an unprecedented liability for the activities of any corporate officer who in his own right owns or controls a second corporation. Assume the situation of a stockholder in a manufacturing concern whose president owns a small percentage of stock, 5 percent or 10 percent, in that corporation. If the corporation president were to buy a majority interest in a trucking company, for example, is the stockholder of the manufacturing corporation to be held accountable through his investment for the liabilities incurred through corporate activities of the trucking concern?

Rejecting the well-established principle that "The insulation of a stockholder from the debts and obligations of his corporation is the norm, not the exception", *N.L.R.B.* v. *Deena Artware,* 361 U.S. 398, 403 (1960), the Board presumably would respond in the affirmative. To reverse the presumption enunciated in *Deena Artware,* of course emasculates the concept of limited liability. It would be absurd to impose upon an investor in Ford Motor Company the burden of a liability incurred by any corporation owned by a member or members of the Ford family. Yet this is the logical outgrowth of the Board's theory of a "common enterprise", arising in part from its blindness to the es-

sential fact that an individual and a corporation are not one and the same.[24]

If the corporate entity is to be deprived of its traditional immunities in this fashion, virtually no individual purchaser of its securities can escape the very real risk that the acts of the corporation's officers in the purchase or direction of otherwise unrelated corporations, will bind him to an unforeseen and unforeseeable diminution of his purchase.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the decree of the Court of Appeals be affirmed. If this Court, however, does not accept the holding of the court below to the effect that a business can be permanently liquidated, in whole or in part for any reason, it should be observed that the case is not ripe for final decision and should be remanded. The court below did not pass upon the issue of whether substantial evidence considered on the record as a whole supported two findings crucial to the 3-2 decision of the Board *viz.*,

(1) Respondent, Darlington, in closing its plant, was motivated by discriminatory reasons; and

(2) The so-called "Dearing Milliken complex" constituted a single employer.

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[24] In *Mount Hope Finishing Co.* v. *N.L.R.B.*, 211 F.2d 365, 372 (1954), the court expressly relied on the fact that a stockholder had substantial, though minority (36%) stock holdings in one corporation and no stock in the other corporation, in reaching the conclusion that the two corporations were not a single enterprise.

This aspect of the matter was noted by the Solicitor General, who suggested (Pet. for Cert., p. 10, n. 6a):

> Since the court did not consider whether the finding was sustained by substantial evidence, the issue would appear to be open on remand. For the purposes of this petition we take the case on the assumption made by the court below.

It is submitted that questions of such crucial importance to American industry should not be finally decided in the absence of Court of Appeals review of the Board's findings of fact.

Respectfully submitted,

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